No. 89-459

(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DELTA AIR LINES, INC.,

Petitioner,

v.

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

BRIEF OF THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE AND THE AIR TRANSPORT ASSOCIATION OF AMERICA AS *AMICI CURIAE* SUPPORTING CERTIORARI

ROBERT J. DELUCIA
(Counsel of Record)
AIRLINE INDUSTRIAL RELATIONS CONFERENCE
1920 N Street, N.W.
Washington, D.C. 20036
(202) 861-7552

DAVID A. BERG
AIR TRANSPORT ASSOCIATION OF AMERICA
1709 New York Avenue, N.W.
Washington, D.C. 20006
(202) 626-4234

Counsel for the Airline Industrial Relations Conference and the Air Transport Association of America as Amici Curiae

October 18, 1989

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

24 pp

QUESTIONS PRESENTED

1. Whether, under the Railway Labor Act, a union grievance which seeks damages for a claimed breach of a collective bargaining agreement's successor clause—purportedly requiring a merged airline to recognize the union as the representative of a minority group of employees after a merger—raises issues of employee representation within the exclusive jurisdiction of the National Mediation Board.

2. Whether the National Mediation Board's decision terminating the union representation certification of the acquired carrier's union, as of the date of the merger, renders moot the union's request to arbitrate a grievance involving representation issues under a successor clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-459

DELTA AIR LINES, INC.,

Petitioner,

v.

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The District Of Columbia Circuit

BRIEF OF AMICI CURIAE THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE AND THE AIR TRANSPORT ASSOCIATION OF AMERICA

INTERESTS OF AMICI CURIAE

Pursuant to Rule 36 of the Rules of the Supreme Court, the Airline Industrial Relations Conference (AIRCON) and the Air Transport Association of America (ATA) file this brief as Amici Curiae in support of the Petition for a Writ of Certiorari of

Petitioner Delta Air Lines, Inc. (Delta).[1] AIRCON and ATA adopt and support the arguments of Petitioner Delta that the National Mediation Board (NMB) has exclusive jurisdiction over all representation disputes, regardless of the context in which they arise. AIRCON and ATA file this brief amici curiae in order to emphasize the importance of this matter to airline industry labor relations and to provide the Court with the special history and perspective of the airline industry.

AIRCON and ATA have a substantial interest in the disposition of this case. AIRCON is an unincorporated voluntary association of twenty-one United States scheduled air carriers formed to facilitate the exchange of ideas and information concerning personnel and labor relations matters. AIRCON represents its member air carriers with respect to related legislative, judicial and administrative proceedings. ATA is a Washington based trade and service association of twenty-one United States airlines and two Canadian airlines. The membership of AIRCON and ATA include every major air carrier in the United States.[2] Because AIRCON and ATA air carrier members are covered by the Railway Labor Act, 45 U.S.C. sections 151-188 (RLA), they will be directly and substantially affected in their labor relations by the resolution of this case.

The decision of the D.C. Circuit creates uncertainty and unpredictability with respect to the rights and

---

[1] Letters of consent from all parties to the filing of this brief have been filed with the Clerk of this Court.

[2] AIRCON and ATA member carriers are listed in the Appendix.

obligations of parties covered by the Railway Labor Act involved in transactions such as mergers, acquisitions, and asset sales. An interpretation of the Railway Labor Act which permits unions to arbitrate disputes involving representation issues, albeit under the guise of breach of contract claims for monetary damages, would deprive the industry of its well-established reliance upon the National Mediation Board as the sole forum for resolving all representation issues. If forced to adjudicate representation related claims in a multitude of forums, one of the key features of the RLA, which has been relied upon by unions and employers alike,. would be severely undermined. Since it is likely that the industry will be involved in many transactions which may raise representation issues in the coming years, it is important that parties be able to predict with some degree of reliability what their rights and obligations will be in connection with any potential transaction. Reversal of the D.C. Circuit's unprecedented decision is of fundamental importance to fulfill the RLA's purposes of creating uniformity, stability, and predictability in airline and rail labor law. For these reasons, AIRCON and ATA respectfully submit this brief as Amici Curiae.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Prior to this case, the uniform body of authority had made clear that the NMB has exclusive jurisdiction over all claims that entail issues of employee representation. This Court's rulings in *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), followed by subsequent appellate and district court cases, have definitively held that representation

disputes are outside the jurisdiction of federal courts and private arbitrators. Although AFA - and the D.C. Circuit - characterize this dispute as a grievance raising breach of contract issues, the subject matter of the dispute is a disagreement regarding the rights and obligations of a labor organization and an airline with respect to representation of the airline's employees following a merger. The merit of AFA's damage claim is dependent on a determination that AFA was entitled to continue as the post-merger representative of the Western flight attendants. Therefore, the dispute is inextricably intertwined with representational issues, which only the NMB can resolve.

In the airline industry, it was previously well-settled that labor and management were required to refer all representation disputes arising out of mergers and other corporate transactions to the NMB. Throughout the post-World War II era, air carriers have engaged in over 30 mergers out of which have arisen numerous representation claims. These representation claims have been decided by the NMB - not by arbitrators or federal courts, even though almost every airline union contract contains some provision upon which a claim of successorship could be raised. By having a single forum where these issues can be determined, the parties have been able to resolve these disputes with finality and reliability. This has avoided the uncertainty and fragmentation of jurisdiction and bargaining units that can result in unnecessary labor strife in industries covered by the National Labor Relations Act. In so doing, it has benefited carriers, employees, and the public.

Failure to reverse the D.C. Circuit's decision would radically alter the previously well-established law and

the airline industry's approach to transactions which raise representation issues. The possibility of open-ended damage awards would affect the manner in which parties structure transactions, just as surely as would injunctive or declaratory relief. The D.C. Circuit's decision would fragment the jurisdictional framework for representation matters, and lead to labor instability, split bargaining units, and legal unpredictability. That result is antithetical to the labor policies embodied in the Railway Labor Act.

ARGUMENT

STABLE AIRLINE LABOR RELATIONS AND ECONOMIC GROWTH NECESSITATE THAT THE AIRLINE INDUSTRY HAVE A SINGLE FORUM—THE NATIONAL MEDIATION BOARD—WHICH RESOLVES ALL QUESTIONS OF REPRESENTATION RAISED BY MERGERS AND OTHER TRANSACTIONS.

In the airline industry, all representation disputes arising from mergers and other corporate transactions have been handled by the National Mediation Board. This is consistent with the universally recognized legal principle that the "NMB alone is vested with the final decision-making authority over representation issues." *Procedures for Handling Representation Issues Resulting From Mergers, Acquisitions or Consolidations in the Airline Industry*, 14 NMB 388 (1987) (NMB Airline Merger Procedures); *see also Western Airlines v. International Brotherhood of Teamsters*, 480 U.S. 1301 (1987) (J. O'Connor); *Air Line Employees Association v. Republic Airlines, Inc.*, 798 F.2d 967 (7th Cir.), *cert. denied*, 479 U.S. 962 (1986). The D.C. Circuit's decision, by fragmenting the adjudicatory process with respect to representation issues, has thrown this previously settled area of

law into question. With hundreds of millions of dollars at stake in these transactions, along with tens of thousands of jobs, the potential impact of the D.C. Circuit's misapplication of the law should not be underestimated.

A. Mergers and Corporate Transactions In The Airline Industry

Since 1945, there have been over 30 airline mergers. Most of today's carriers are a product of past mergers over many years. A partial list of the current airlines and their merged entities would include:

Alaska - Jet America

American - Air Cal, Trans Caribbean

Braniff - Florida Express, Mid-Continent

Continental - New York Air, People Express, Pioneer, Texas International

Delta - Chicago & Southern, Northeast, Western

Eastern - Colonial

Federal Express - Flying Tigers, Seaboard, Slick

Midway - Air Florida

Northwest - Bonanza, Challenge, Hughes Air West, Monarch, North Central, Pacific, Republic, Southern, West Coast

Pan Am - American Overseas, National, Panagra

TWA - Ozark

United - Capitol

USAir - Empire, Lake Central, Mohawk, Pacific Southwest, Piedmont

Besides mergers, there have also been a number of sales of assets or routes involving the transfer of employees, such as United's acquisition of Pan Am's Pacific Routes. In many instances, the merger, or other corporate transactions, has saved a financially ailing carrier from failure along with the jobs of thousands of its employees.

This pattern of airline mergers and acquisitions, which began during regulated times, has continued throughout the deregulated era, as the industry, reacting to market forces, has undergone a massive consolidation.[3] Future mergers and corporate transactions which raise representation disputes will certainly be forthcoming. Several financially weak carriers have indicated that they will almost certainly need to be acquired or merged. Many carriers are either acquiring, buying an interest in, or entering into marketing and operating agreements with regional feeder airlines.[4] Other carriers are entering into

---

[3] Between 1985 and 1988, the Department of Transportation approved the following acquisitions or mergers: USAir-Pennsylvania Commuter (85-5-115); Midway-Air Florida (85-6-33); Southwest-Muse (85-6-79); People Express-Frontier (85-11-58); United-Pan American Pacific Routes (85-11-67); Piedmont-Empire (86-1-45); Horizon-Cascade (86-1-67); People Express-Britt (86-2-34); Northwest-Republic (86-7-81); Presidential-Key Airlines (86-8-32); United-People Express/Frontier (86-8-33); Alaska-Jet America (86-9-18); TWA-Ozark (86-9-29); Texas Air-Eastern (86-10-2); Texas Air-People Express (86-10-53); Delta-Western (86-12-30); Alaska Air-Horizon (86-12-61); USAir-Pacific Southwest Airlines (87-3-11); American-Air California (87-3-80); USAir-Piedmont (87-10-58). References are to DOT docket numbers.

[4] Examples of these commuter airline relationships would include: American-American Eagle; Northwest-Northwest Airlink; Pan Am-Pan Am Express.

financial and marketing arrangements with foreign airlines, such as KLM's purchase of an interest in Northwest, Swissair and Delta buying stock in each other, and British Air's proposed investment in United.[5]

Generally, past airline mergers have proven to be a financial success for the surviving carrier, and beneficial to the combined work force. Since deregulation started in 1978, airline employment has soared nearly 50% from 329,000 to 480,000.[6] As the bulk of the air carriers are heavily unionized, union membership has also grown substantially.

B. Representation Issues in Airline Mergers and Corporate Transactions

Although airline mergers and similar corporate transactions are primarily business transactions, they inevitably create questions of employee representation. In some instances, the same union may represent the employees in the same craft or class on both carriers. This is particularly common with pilots, where the Air Line Pilots Association (ALPA) frequently represents the pilots on both carriers. However, with many other employee groups, the employees of carrier A and carrier B either have different unions or one employee group may have preferred to remain unrepresented.

---

[5] Even the unions are now interested in acquiring airlines. The Air Line Pilots Association has joined with United's management in the proposed buyout of the carrier.

[6] Air Transport 1989, The Annual Report of the U.S. Scheduled Airline Industry (ATA Report) at 12. Copies of the ATA Report have been lodged with the office of the Supreme Court Clerk for the Court's convenient reference.

Where the merger involves different unions - or the larger carrier is non-union - the NMB has often ruled that the certification of the minority union on the smaller carrier is extinguished upon the operational merger of the two carriers. *See e.g. USAir/ Pacific Southwest Airlines, Inc.*, 15 NMB 135 (1988); *Republic Airlines/Hughes Air West*, 8 NMB 49 (1980). Not surprisingly in such situations, the minority union - such as AFA at Delta/Western - will pursue every avenue in an effort to extend its status as the representative of its former members.

However, with the exception of the D.C. Circuit opinion, the courts have unanimously held that there is only one avenue available for pursuing representation matters - and that avenue is the NMB. In situations where the NMB's "majority of the craft" rules result in a favorable outcome for a union, the union is quite willing to go down this avenue. Conversely, where the NMB's rules would produce a result unfavorable to the union, the unions have sometimes sought relief from the courts or arbitrators, usually under the guise of enforcing the successorship or scope clause provisions of the minority union's contract. However, the courts have repeatedly recognized that disputes involving representation and other issues may not be split apart for separate resolution by separate adjudicators. *See* e.g. *Western Air Lines v. International Brotherhood of Teamsters*, supra; *Air Line Employees Association v. Republic Airlines*, supra; *International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157 (5th Cir. 1983).

Vested with exclusive jurisdiction over representation claims arising from mergers, acquisitions, and

other corporate transactions, the NMB has responded by exercising its authority over a variety of situations including:

- mergers of unionized carriers; e.g. *Northwest/Republic Airlines,* 13 NMB 399 (1986);

- mergers of unionized and non-union carriers, the pending merger of *Federal Express/Flying Tigers*, 16 NMB 433 (1989);

- creation of non-union sister airline by holding company of unionized carrier, *Frontier/ Frontier Horizon*, 11 NMB 138 (1984);

- purchase of non-union carrier by holding company of unionized carrier, *Transamerica/TransInternational*, 12 NMB 204 (1985); and

- common ownership of multiple commuter carriers, serving as feeder lines to two different major airlines, *Metro Airlines*, 16 NMB 353 (1989).

The statutory requirement of having the NMB handle all merger and corporate transaction related representation issues has worked well for all parties. For the traveling public, there have been no labor disruptions to service, as over 30 mergers have proceeded without producing a single strike. For management, they have been able to rely upon the Board's past precedents, so they can know what their rights and obligations are with respect to representation. For the unions, they have usually been able to ascertain quickly what their post-merger status will

be, and avoid unending, intramural bouts between majority and minority unions.[7]

C. The D.C. Circuit's Opinion Upsets Well-settled Law and Creates Uncertainty and Unpredictability with Respect to Airline Representation Disputes

The airline mergers and acquisitions described above succeeded - on the whole - because the surviving carrier, in accordance with the policies of the RLA, was able to meld two separate groups of workers into one cohesive unit. Once the surviving carrier has launched the operational merger, it must quickly integrate the work forces and operate as a single carrier with the combined workforce which is vital to the economic success of the new venture. As the NMB itself recognized in *Republic Airlines/Hughes Air West, supra,* the surviving airline must act expeditiously to create a consolidated carrier:

> To do this it needs to be able to integrate its work force. The current agreement restrictions which apply to mechanics and jurisdictional restraints on work on aircraft demonstrate the inherent inefficiency of a two carrier system for representation purposes.

The Fifth Circuit, endorsing the *Republic/Hughes Air West* decision, agreed with the NMB's view that permitting certifications to survive a merger "would reduce the ability of airlines to integrate operations

---

[7] For the minority union, the NMB has evolved special procedures which make it easier for an ousted union to obtain an election to gain representation rights. *NMB Airline Merger Procedures,* 14 NMB at 391-92.

and to maintain a single system." *Teamsters v. TXI, supra*, 717 F.2d at 163. The court pointed out that:

> One clerk would have a union representative; two of his neighbors would be unrepresented. One employee's working conditions and grievance procedures would be governed by a collective bargaining agreement; two of his neighbors would not. We defer to the Board's rationale, based on the board's expertise and the statutory delegation of authority to it, to determine disputes concerning who are the representatives of the carrier's employees.

Id.

If, as AFA wants, the minority union were to survive the merger, such consolidation could well be impossible. Transition agreements are difficult enough to achieve with just one union per craft or class. They may become impossible to achieve where two unions are vying to gain a competitive advantage over one another. Multiple, split representation status perpetuates disunity and cripples the carrier's efforts to form a cohesive workforce. One can only imagine the labor chaos which would confront Northwest today if it still had to apply Bonanza's contracts; or USAir if it had to deal with Mohawk's unions. Carrying AFA's proposal to its logical end, an airline could face a situation wherein part of the craft represented by one union could go out on strike, while the other part of the craft, with a different representative, remained on the job.

In its opinion, the D.C. Circuit suggests that such fears are unfounded. The court indicates that it is not interfering with the NMB or intruding into the

representation aspects of a merger, but merely giving the minority union the opportunity to obtain monetary damages for the alleged breach of the successorship clause. Contradicting the holdings of every other judicial body, the D.C. Circuit attempts to separate the inseparable. While acknowledging that the successorship clause was unenforceable in a representation context, the court nonetheless found that it is fully viable as a breach of contract claim:

> Although those [congressional] policies do support a rule that a successorship clause cannot be specifically enforced, they simply do not require that an award of damages for breach of such a clause be barred.

879 F.2d at 916-17.

In a side comment, the opinion goes on to state that:

> The most that can be said in support of Delta's position is that if a carrier were liable in damages for breach of the successorship clause in its CBA, it might forego entering into an otherwise desirable merger.

879 F.2d at 917.

What the D.C. Circuit ignores is that these "otherwise desirable merger(s)" in many cases are the only practical means to protect jobs as well as to provide continuity of service to the public. A merger may not only be "desirable" to the acquiring carrier, but absolutely vital to the purchased airline.

Moreover, the threat of prolonged arbitration proceedings resulting in unpredictable, open-ended damages, can negatively affect a transaction just as surely

as can an injunction, which the D.C. Circuit concedes it has no authority to issue. While technically denying the union an injunction, the D.C. Circuit has given the union a tool which is nearly as powerful. A carrier would find it difficult to proceed with a merger - or other substantial acquisition - knowing that the result could be an unpredictable damages award.

As if to emphasize this point, AFA suggests, and the D.C. Circuit assumes, that in order to avoid liability, Delta - and other acquiring carriers - should structure the acquisition so that both carriers continue as separate operating entities, albeit under the umbrella of one holding company. That, of course, is part of the injunctive relief which AFA (and the Teamsters and Air Transport Employees unions in the Ninth Circuit) originally sought. And, for the reasons expressed by the NMB and every other court that has ruled on the issue, it is not a viable option in either economic or legal terms.

From an economic viewpoint, without a full merger of the two carriers, most acquisitions cannot produce the operational synergies and efficiencies necessary to maintain a viable enterprise. This is particularly likely to be true where a "failing" carrier is involved.

From a legal standpoint, even if a purchaser might keep the two carriers separate in an effort to avoid unpredictable damage awards, the legal ramifications could be devastating. The purchasing carrier would be exposed to potentially conflicting arbitration awards, as well as NMB proceedings instituted by rival unions. The majority union on the purchasing carrier, airline A, might obtain an award finding that its scope clause extends to the acquired carrier, airline B. Or the majority union might instigate a "single

carrier" representation proceeding before the NMB, which could result in a ruling that the certifications on carrier A extend to - and extinguish the minority union certifications on - carrier B. At the same time, the minority union on carrier B may obtain an arbitration award in its favor based on its successorship clause. In short, the purchasing carrier would be faced with arbitration awards that not only conflict with one another, but also with the determination of the NMB.

It is precisely to avoid such conflicting and irrational results that Congress gave the NMB exclusive jurisdiction over all disputes involving representation rights.

CONCLUSION

Representation disputes arise frequently in connection with airline mergers and similar transactions. By vesting the National Mediation Board with exclusive jurisdiction over all aspects of representation claims, Congress ensured that the transaction could proceed in a rational and predictable fashion, while the representation rights of the employees and the union are equitably resolved in a uniform and democratic manner. The decision of the D.C. Circuit would disrupt this successful system and threaten unnecessary disruption to air carriers, employees, and unions.

Accordingly we respectfully urge that this Court grant the petition for a writ of certiorari, and reverse the D.C. Circuit Court's opinion.

Respectfully submitted,

ROBERT J. DELUCIA
Counsel Of Record
AIRLINE INDUSTRIAL RELATIONS CONFERENCE
1920 N Street, N.W.
Washington, D.C. 20036
(202) 861-7552

DAVID A. BERG
AIR TRANSPORT ASSOCIATION OF AMERICA
1709 New York Avenue, N.W.
Washington, D.C. 20006
(202) 626-4234

APPENDIX

APPENDIX

AIR Conference Members

ABX Air

Alaska Airlines, Inc.

Aloha Airlines, Inc.

America West Airlines

American Airlines, Inc.

Braniff, Inc.

Continental Airlines, Inc.

Delta Air Lines, Inc.

Eastern Air Lines, Inc.

Federal Express Corporation

Midway Airlines, Inc.

Northwest Airlines, Inc.

Pan American World Airways, Inc.

Reeve Aleutian Airways, Inc.

Southwest Airlines

Tower Air

Trans World Airlines, Inc.

The Trump Shuttle

United Airlines, Inc.

United Parcel Service

USAir, Inc.

ATA Members

Alaska Airlines, Inc.

Aloha Airlines, Inc.

American Airlines, Inc.

American TransAir

Braniff, Inc.

Continental Airlines, Inc.

Delta Air Lines, Inc.

DHL Airlines

Eastern Air Lines, Inc.

Evergreen International Airlines

Federal Express Corporation

Hawaiian Airlines

Midway Airlines, Inc.

Northwest Airlines, Inc.

Pan American World Airways, Inc.

Southwest Airlines

Trans World Airlines, Inc.

The Trump Shuttle

United Airlines, Inc.

United Parcel Service

USAir, Inc.

Associate Members

Air Canada

Canadian Airlines International